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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUZANNE D. JACKSON,

Plaintiff,

v.

WILLIAM FISCHER; JON SABES;
STEVEN SABES; MARVIN SIEGEL;
BRIAN CAMPION; LONNIE
BROOKBINDER; MANI
KOOLASURIYA, JORGE FERNANDES,
JOSHUA ROSEN, STEVE
WATERHOUSE, JEAN PAUL a/k/a
"BUZZY" LAMERE, UPPER ORBIT,
LLC, SPECIGEN, INC.; PEER DREAMS
INC.; NOTEBOOKZ INC.;
ILEONARDO.COM INC.; NEW MOON
LLC; MONVIA LLC, CII LIMITED; and
SAZANI BEACH HOTEL,

Defendants.

Case No. 4:11-cv-02753-PJH

**DEFENDANTS JON SABES, STEVEN
SABES AND MARVIN SIEGEL'S NOTICE
OF MOTION AND MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED
COMPLAINT**

Date: August 28, 2013
Time: 9:00 a.m.
Dept: Courtroom 3, 3rd Fl.
Judge: Honorable Phyllis J. Hamilton

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 28, 2013, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Phyllis J. Hamilton, located at the United States District Court for the Northern District of California, 1301 Clay Street, Oakland, California, defendants Marvin Siegel, Jon Sabes and Steven Sabes (together, the “D&O Defendants”) will and hereby do move for an order dismissing the Third Amended Complaint (the “TAC”) in this action.

The D&O Defendants make this motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6), or 9(b) and 8(a) on the grounds that:

1. Plaintiff’s First Claim for Relief for violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (the “Exchange Act”) fails to state a claim for relief because (a) the TAC fails to specify the statement or statements alleged to have been false or misleading with the specificity required by Rule 9(b) and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the “PSLRA”); (b) the TAC fails to attribute any alleged false statement to any of the D&O Defendants; (c) the TAC fails to identify a material misstatement; (d) the TAC fails to plead facts establishing that any misstatement was false or misleading when made; and (e) the TAC fails to plead facts giving rise to a strong inference of scienter.

2. Plaintiff’s Second Claim for Relief for violations of California Corporations Code Sections 25401 and 25501 (“Sections 25401 and 25501”) fails to state a claim for relief because (a) the TAC fails to allege that any of the D&O Defendants made a false statement or omission in connection with a sale of securities; and (b) the TAC fails to allege that Plaintiff was in privity with any of the D&O Defendants;

3. Plaintiff’s Third Claim for Relief for violations of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a) (“Section 20(a)”) fails to state a claim for relief because (a) the TAC fails to establish a primary violation of the Exchange Act; and (b) the TAC fails to allege that the D&O Defendants exercised actual power or control over any primary violator;

4. Plaintiff’s Fourth Claim for Relief for violations of California Corporations Code

1 Section 25504 (“Section 25504”) fails to state a claim for relief because (a) the TAC fails to
 2 allege an agency relationship between the D&O Defendants and Mr. Fischer with the specificity
 3 required by Rule 9(b); (b) the TAC fails to allege facts establishing that Defendant SpeciGen, Inc.
 4 (“SpeciGen”), Defendant William Fischer or anyone else connected with SpeciGen made a
 5 material misstatement in connection with a sale of securities; and (c) the TAC fails to allege that
 6 the D&O Defendants had knowledge or reasonable grounds to believe that SpeciGen, Mr. Fischer
 7 or anyone else was primarily liable for violations of Sections 25401 and 25501;

8 5. Plaintiff’s Fifth Claim for Relief for breach of fiduciary duty fails to state a claim
 9 for relief because (a) the TAC fails to plead specific facts showing that any of the D&O
 10 Defendants acted in bad faith, as required to establish liability for breach of a duty of care under
 11 the exculpatory provision in SpeciGen’s Certificate of Incorporation (the “Certificate”); (b)
 12 Plaintiff lacks standing to bring a claim for breach of fiduciary duty because any harm suffered
 13 was suffered in the first instance by SpeciGen, and the only damage suffered by Plaintiff was the
 14 loss of value of her investment (*Eshelman v. OrthoClear Holdings, Inc.* 2008 WL 171059, *7
 15 (N.D. Cal. Jan. 12, 2008)); (c) Plaintiff’s derivative claim for breach of fiduciary duty conflicts
 16 with her direct claims for damages and rescission (*id.*); and (d) the TAC fails to allege that the
 17 D&O Defendants failed to implement a system of controls or consciously failed to monitor the
 18 operation of such a system, as required for a “failure of oversight” claim under Delaware law;

19 6. Plaintiff’s Eighth Claim for Relief for negligent misrepresentation fails to state a
 20 claim for relief because the TAC fails to allege a misrepresentation or reliance with the specificity
 21 required by Rule 9(b);

22 7. Plaintiff’s Ninth Claim for Relief for violations of California Corporations Code
 23 Section 25501.5 (“Section 25501.5”) fails to state a claim for relief because (a) the TAC fails to
 24 allege that any of the D&O Defendants participated in any transaction involving the sale of
 25 securities or otherwise acted as a broker-dealer in the State of California; and (b) any claim for
 26 relief under Section 25501.5 would be time-barred;

27 8. Plaintiff’s Tenth Claim for Relief for common law fraud fails to state a claim for
 28 relief because the TAC fails to allege a misrepresentation, scienter or reliance with the specificity

1 required by Rule 9(b); and

2 9. Plaintiff's Eleventh Claim for Relief for respondeat superior fails to state a claim
3 for relief because (a) "respondeat superior" is not an independent cause of action; and (b) Plaintiff
4 fails to allege the existence of an agency relationship with the specificity required by Rule 9(b).

5 The D&O Defendants' motion is based on this Notice of Motion and Motion, the
6 accompanying Memorandum of Points and Authorities, Request for Judicial Notice and the
7 Declaration of Tanya Herrera filed and served herewith, the pleadings and records on file herein,
8 and such additional materials and argument as may be presented to the Court at or before the
9 hearing on the Motion.

1 **I. INTRODUCTION**

2 Defying all known pleading standards, the TAC repeatedly cries “fraud” without pointing to a
 3 single fact that might support any such claim. Like its predecessors, the TAC fails to identify *which*
 4 statements by *which* defendants are allegedly actionable, and entirely omits the requisite “explanation
 5 as to *why* the statement or omission complained of was false or misleading.” *In re GlenFed, Inc. Sec.*
 6 *Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (emphasis added). Likewise, this 48-page search for a
 7 meaningful factual allegation offers only a boilerplate recital of scienter – supported solely by generic
 8 “motive and opportunity” allegations – none of which approaches the mandated standards of the
 9 Ninth Circuit and the PSLRA. These pleading defects are obvious and abundant and discussed in
 10 greater detail below. Of greatest significance, however, is the now apparent reason for this failure:

11 ***Not for lack of opportunity.*** The TAC represents Plaintiff’s *fourth* attempt to state a claim for
 12 relief against the D&O Defendants. Despite ample guidance from the Ninth Circuit and the Northern
 13 District of California, Plaintiff’s Second Amended Complaint (the “SAC”) was “confusing and
 14 replete with conclusory allegations.” Order Granting Motions to Dismiss (ECF No. 177) (the
 15 “Order”) at 28. Among other things, the SAC (1) failed to attribute any alleged misstatement to the
 16 D&O Defendants (and Plaintiff’s counsel later conceded that there were no such statements); and (2)
 17 failed to articulate a coherent theory of secondary liability. Accordingly, the Court dismissed
 18 Plaintiff’s Section 10(b) claims against the D&O Defendants *with prejudice* and offered detailed
 19 guidance with respect to Plaintiff’s remaining claims. Ignoring this guidance, Plaintiff has now filed
 20 yet another confusing and conclusory pleading. Although Plaintiff was clearly warned that “[a]n
 21 amended complaint that does not provide a coherent explanation of the facts and a plausible statement
 22 of the claims will be dismissed with prejudice” (Order at 29), she repeats – and even aggravates – all
 23 of the SAC’s original pleading failures. Incredibly, Plaintiff even repeats her Section 10(b) claims
 24 against the D&O Defendants, despite the Order dismissing these claims with prejudice.

25 ***Not for lack of discovery.*** Plaintiff filed her initial complaint more than two ago. Since then,
 26 she has amended her pleading three times and commenced a parallel proceeding against Mr. Fischer
 27 in the U.S. Bankruptcy Court for District of Minnesota (the “Adversary Proceeding”), thereby
 28 circumventing the PSLRA’s mandatory discovery stay. At the hearing on the D&O Defendants’

1 motion to dismiss the SAC, Plaintiff's counsel confirmed that Plaintiff was seeking discovery in the
 2 Adversary Proceeding and would soon be receiving "an abundant amount of material" from Mr.
 3 Fischer (Transcript of Oral Argument ("Tr.") at 17:10 (ECF No. 174), including "25,000 documents"
 4 (*id.* at 48:3).¹ In addition, Plaintiff's counsel indicated that he would be deposing Mr. Fischer (*id.* at
 5 48:6) – which he has apparently done (*see* TAC at ¶¶ 45, 61, 92, 111, 115 and 142) – and has
 6 consulted with an inside source from SpeciGen (Tr. at 21:8-9). Despite these unusual procedural
 7 advantages, the TAC does not identify a single email, internal report or other contemporaneous
 8 document suggesting that any alleged misstatement was knowingly false or misleading when made.

9 ***Surely not for lack of guidance.*** This Court and numerous others have made clear the
 10 requirements for identifying an actionable misstatement, for pleading contemporaneous facts
 11 establishing falsity, and for raising a strong inference of scienter. It is no mystery that plaintiffs
 12 cannot simply rely on later events to support the claimed falsity of earlier statements: "The fact that
 13 an allegedly fraudulent statement and a later statement are *different* does not necessarily amount to an
 14 explanation as to why the earlier statement was false." *GlenFed, supra*, 42 F.3d at 1549 (emphasis
 15 original). Nor can Plaintiff rely upon "group pleading" to raise any inference of scienter. In the
 16 absence of specific factual allegations establishing an actionable misstatement and a strong inference
 17 of scienter, this Court has "no way of distinguishing [Plaintiff's] allegations from the countless
 18 'fishing expeditions' which the PSLRA was designed to deter." *In re Silicon Graphics, Inc. Sec.*
 19 *Litig.*, 183 F.3d 970, 988 (9th Cir. 1999).

20 After two years and four amendments, there can be only one reason why experienced counsel
 21 with every opportunity and procedural advantage have nonetheless profoundly failed to state a
 22 Section 10(b) claim against SpeciGen, the D&O Defendants or anyone else connected to SpeciGen:
 23 ***this simply is not a fraud case.*** Plaintiff's inability to plead a Section 10(b) claim also dooms her
 24 claims under Section 20(a), the California Corporations Code and California common law.
 25 Accordingly, the TAC should be dismissed with prejudice.

26
 27
 28 ¹The Adversary Proceeding is set for trial on September 16, 2013, less than three months from now.
See Second Amended Order for Trial (Herrera Decl. Ex. A).

II. SUMMARY OF ALLEGATIONS

Plaintiff's latest attempt to state a claim for relief against the D&O Defendants relies on the same basic allegations as her previous efforts. Once again, Plaintiff alleges that she was the victim of a scheme to defraud orchestrated by Mr. Fischer. According to the TAC:

Fischer acted as agent for, was aided and abetted by, and could not have perpetrated his scheme without the other named defendants who, as officers and directors of the companies in which [Plaintiff's] funds were placed, proceeded to waste her assets while repeatedly misleading her through exaggeratedly optimistic statements about their companies' prospects and withholding material information, including but not limited to the fact that Fischer was a twice-convicted felon.

TAC at ¶ 2. Despite numerous variations on this theme, Plaintiff has never accused Mr. Fischer, Specigen or any of the D&O Defendants of making any alleged misstatement in writing.² Instead, Plaintiff's claims for relief are based on alleged oral misstatements.

Until recently, Plaintiff claimed that Mr. Fischer was solely responsible for making false statements about Specigen. At the hearing on the D&O Defendants' previous motion to dismiss, Plaintiff's counsel "concede[d] without question" that the D&O Defendants "were not the so-called speakers in this case." Tr. at 8:3-5. Because Section 10(b) liability extends only to "speakers" (*see* Section IV.A.1, *infra*), the Court concluded that the SAC failed to state a Section 10(b) claim against the D&O Defendants and could not be amended to do so. Order at 8. Accordingly, the Court dismissed Plaintiff's Section 10(b) claims *with prejudice* and further cautioned Plaintiff against "add[ing] any new claims or parties without leave of court." *Id.* at 29.

Ignoring the Order and her own counsel's concession, Plaintiff now claims that Mr. Fischer and/or one or more of the other individual defendants connected to Specigen (cumulatively, the "Specigen Defendants") misrepresented Specigen's fundraising and partnership prospects during a dinner meeting in Palo Alto in February 2007.³ TAC at ¶¶ 88-89. According to the TAC, "defendants" falsely represented that:

² To the contrary, Plaintiff claims that she never received any written materials prior to making her investments in Specigen. TAC at ¶ 47.

³ Plaintiff did not seek leave to re-plead her Section 10(b) claims against the D&O Defendants and ignored the D&O Defendants' attempt to meet and confer to understand the reason for her apparent contempt of court.

- Specigen’s Series A offering “was moving along well” (TAC at ¶ 89(a));
- “Genentech had vetted the company’s technology” (*id.* at ¶ 89(b));
- Specigen was “in advanced discussions” with an unidentified “public company and an established private biotech company about advanced research partnerships that would develop preclinical data sufficient to complete clinical trials” (*id.* at ¶ 89(c)).

None of these allegations appears in any of Plaintiff’s prior pleadings. Moreover, and more importantly, none of them adequately alleges what any of the D&O Defendants supposedly said (if anything), why the statements were false or misleading when made or the factual basis for a strong inference that they were made with scienter. Similarly, the TAC recites a laundry list of purported omissions (TAC at ¶ 90), but makes no attempt to identify a statement that was false or misleading by reason of any alleged omission or the basis for a strong inference that any such statement was made with scienter. As discussed in detail below, these pleading failures are fatal to Plaintiff’s latest attempt to plead a Section 10(b) claim against the D&O Defendants. *See* Section IV.A, *infra*.

The TAC also alleges that Mr. Fischer misrepresented Specigen’s fundraising and product development efforts “as agent for Specigen” in October and November 2006. TAC ¶ 87. According to the TAC, Mr. Fischer falsely represented that:

- Specigen’s technology was a “proven concept” (TAC at ¶ 87(a));
- Specigen’s technology was being reviewed for partnering or licensing by one or more unidentified “publicly traded pharmaceutical companies” (*id.*);
- Specigen had an “industrial research collaboration” with an unidentified “prominent biotech company” (*id.* at ¶ 87(c));
- Specigen’s technology had been “validated” by an unidentified “commercial biotech company” (*id.* at ¶ 87(d));
- Specigen “had all of the licenses and patents needed to commercially develop its technologies” (*id.* at ¶ 87(h));
- Specigen’s Series A offering “would be fully sufficient to carry the company to its ‘exit strategy,’ at which point [Plaintiff] could recover her investment at a profit” (*id.* at ¶ 87(b));
- Specigen’s “exit strategy” would come within two or three years (*id.* at ¶ 87(g));

- Specigen’s Series A offering “consisted solely of convertible promissory notes” (*id.* at ¶ 87(e)); and
- Specigen’s Series A offering “was fully subscribed” by “sophisticated investors with biotech startup knowledge and experience” (*id.* at ¶ 87(f)).

The TAC devotes several pages to Mr. Fischer’s alleged misstatements (TAC at ¶¶ 87-89), but makes no attempt to specify what Mr. Fischer actually said or why the statements were allegedly false when made. As discussed in detail below, these pleading failures are fatal to Plaintiff’s attempt to state a claim for relief against the D&O Defendants.

III. APPLICABLE LEGAL STANDARDS

A motion to dismiss is proper under Federal Rule of Civil Procedure § 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). In determining whether plaintiffs have alleged facts sufficient to establish their claims, the court accepts all well-pled factual allegations as true and construes them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, the court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit” or “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), the complaint “must contain sufficient factual matter . . . to ‘state a claim that is plausible on its face.’” *Iqbal, supra*, 556 U.S. at 678 (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* As this Court has explained, “a plaintiff’s obligation to provide the grounds of his entitlement to relief ‘requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’” *In re Bare Escentuals, Inc. Sec. Litig.*, 745 F.Supp.2d 1052, 165 (N.D. Cal. 2010) (*quoting Twombly, supra*, 550 U.S. at p. 555).

Where the complaint alleges fraud, plaintiff must also satisfy the heightened pleading standards mandated by Rule 9(b). Rule 9(b) requires the plaintiff to state with particularity the

circumstances constituting fraud, including the “who, what, when, where, and how” of the charged misconduct. *Vess v. Ciba Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). “Under Rule 9(b), falsity must be pled with specificity, including an account of the ‘time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.’” Order at 6 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)). “In addition, the plaintiff must do more than simply allege the neutral facts necessary to identify the transaction; he must also explain why the disputed statement was untrue or misleading at the time it was made.” *Id.* Once again, Plaintiff does not come close to meeting these standards.

IV. ARGUMENT

A. Plaintiff Still Fails To State A Section 10(b) Claim Against The D&O Defendants

Section 10(b) of the Exchange Act provides, in part, that it is unlawful “to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.” 15 U.S.C. § 78j(b). To state a claim under Section 10(b) and Rule 10b-5 thereunder, a plaintiff must allege (1) a misrepresentation or omission, (2) of material fact, (3) made with scienter, (4) on which the plaintiff justifiably relied, (5) that proximately caused the alleged loss. *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999).

Plaintiffs have long been required to plead securities fraud with the specificity mandated by Rule 9(b). *GlenFed, supra*, 42 F.3d at 1545. In addition, plaintiffs must now satisfy the requirements of the PSLRA. As the Order explains:

Congress established the PSLRA to establish uniform and stringent pleading requirements for securities fraud actions, and to put an end to the practice of pleading “fraud by hindsight.” *See In re Silicon Graphics, Inc.*, 183 F.3d 970, 988 (9th Cir. 1999). Under the PSLRA, the complaint must plead both falsity and scienter with particularity. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009). If the complaint does not satisfy the PSLRA’s pleading requirements, the court, upon motion of the defendant, must dismiss the complaint. 15 U.S.C. § 78u-4(b)(3)(A).

Order at 7. As discussed in detail below, Plaintiff still fails to plead a Section 10(b) claim against the D&O Defendants with the specificity required by Rule 9(b) and the PSLRA. *See* Section IV.A.1, *infra*. Accordingly, Plaintiff’s Section 10(b) claims against the D&O Defendants must be dismissed

1 with prejudice (again).

2 **1. Plaintiff Still Fails To Attribute A Misstatement To The D&O Defendants**

3 In *Janus Capital Group, Inc. v. First Derivative Traders*, the U.S. Supreme Court clarified
4 that Section 10(b) liability is limited to parties who actually “make” a misstatement of material fact.
5 ___ U.S. ___, 131 S.Ct. 2296, 180 L.Ed.2d 166 (2011); *see also In re Coinstar Inc. Sec. Litig.*, 2011
6 WL 4712206, *11 (W.D. Wash. Oct. 6, 2011) (non-speaking officers could not be primarily liable for
7 other officers’ oral statements under *Janus*). At the hearing on the D&O Defendants’ motion to
8 dismiss the SAC, Plaintiff’s counsel conceded that “the three Specigen defendants are non-speakers
9 in the 10b-5 context.” Tr. at 6:25-7:2. Despite this concession, Plaintiff now suggests that one or
10 more of the D&O Defendants misrepresented Specigen’s fundraising and partnership prospects
11 during a dinner meeting in Palo Alto in February 2007. TAC at ¶¶ 88-89. Plaintiff’s new allegations
12 are not only inconsistent with her counsel’s representations to the Court, they are also inadequate
13 under Rule 9(b) and the PSLRA.

14 The Order specifically admonished Plaintiff that “far too many of the allegations in the SAC
15 refer to statements made or actions taken by ‘defendants’” and warned that any amended complaint
16 must “provide a more coherent explanation of the claims being asserted *against each defendant*, and
17 the factual bases for those claims.” Order at 29 (emphasis original). Ignoring this guidance, the TAC
18 alleges that “defendants” made false statements to Plaintiff, without any attempt to specify *which*
19 “defendants” allegedly made *which* misstatements. TAC at ¶¶ 89. These allegations clearly do *not*
20 “give defendants notice of the particular misconduct which is alleged to constitute the fraud charged
21 so that they can defend against the charge and not just deny that they have done anything wrong.”
22 Order at 6 (*quoting Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).⁴ Nor do they
23 “state a claim that is plausible on its face,” given counsel’s previous concession that the D&O
24 Defendants did not make any such statements. *Iqbal, supra*, 556 U.S. at 678 (*quoting Twombly*,
25 *supra*, 550 U.S. at 570); *see also* Tr. at 11:8 (“we don’t question that the three Specigen defendants
26

27 ⁴ These allegations, which are also asserted against Mr. Fischer, are discussed at greater length in the
28 context of Plaintiff’s attempt to state a Section 20(a) claim against the D&O Defendants at Section
IV.B.2.a, *infra*.

1 did not meet with Mrs. Jackson and tell her this stuff”). Accordingly, Plaintiff’s improper attempt to
 2 revive her Section 10(b) claims against the D&O Defendants should be summarily rejected.

3 **2. Plaintiff Still Fails To Allege Facts Establishing That The D&O**
 4 **Defendants Owed – Or Breached – A Duty To Disclose**

5 The TAC does not identify any affirmative statement, by any defendant, that was false or
 6 misleading by reason of a supposed omission. Instead, the TAC suggests that all defendants,
 7 including the D&O Defendants, had a duty to disclose a wide range of operational issues, including
 8 intra-corporate conflicts, pro forma financial projections and fundraising challenges. TAC at ¶ 90.
 9 However, the D&O Defendants had no general obligation to disclose any of these allegedly omitted
 10 “facts.” *See, e.g., Cooperman v. Individual, Inc.*, 171 F.3d 43, 50-51 (1st Cir. 1999) (no duty to
 11 Board-level conflict that led to CEO’s resignation); *In re FoxHollow Technologies, Inc. Sec. Litig.*,
 12 2008 WL 2220600, *23 (N.D. Cal. May 27, 2008) (no duty to disclose internal financial projections);
 13 *In re Stone & Webster, Inc. Sec. Litig.*, 253 F.Supp.2d 102, 126 (D. Mass. 2003) (no duty to
 14 characterize financial results in pejorative fashion, even if results are very poor); *and Mack University*
 15 *LLC v. Halstead*, 2007 WL 4458615, *5 (C.D. Cal. Nov. 14, 2007) (no duty to identify other
 16 investors). Furthermore, the TAC does not allege facts to support the imposition of any such duty.

17 Under Section 10(b), an omission can only be actionable if the defendant had an affirmative
 18 duty to disclose the information. *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (1988) (“Silence,
 19 absent a duty to disclose, is not misleading under Rule 10b-5”). Typically, a duty arises when
 20 someone makes a statement that is materially misleading in the absence of the undisclosed
 21 information. *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (“To be
 22 actionable under the securities laws, an omission must be misleading; in other words, it must
 23 affirmatively create an impression of a state of affairs that differs in a material way from the one that
 24 actually exists”) (citation omitted). The TAC does not identify any such statements.

25 The TAC alleges that the D&O Defendants were officers and directors of SpeciGen (TAC at
 26 ¶¶ 8, 9 and 10), but these allegations do not establish the existence of a duty to disclose. *See In re*
 27 *Interactive Network, Inc. Sec. Litig.*, 948 F.Supp. 917, 920 (N.D. Cal. 1996) (dismissing Section 10(b)
 28 claim against officers and directors because there is no “general duty to disclose”); *see also In re Ivan*

1 *F. Boesky Sec. Litig.*, 825 F.Supp. 623, 625 (S.D.N.Y. 1993) (“corporations and their management are
2 under no general duty to disclose”).

3 “The parties to an impersonal market transaction owe no duty of disclosure to one another
4 absent a fiduciary or agency relationship, prior dealings, or circumstances such that one party has
5 placed trust and confidence in the other.” *Paracor Fin. Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d
6 1151, 1157 (9th Cir. 1996). Plaintiff does not allege that she had a special relationship with any of the
7 D&O Defendants, nor can she. She does not allege that any of the D&O Defendants undertook to act
8 as her investment advisor. Nor does Plaintiff allege that any of the D&O Defendants assumed a duty
9 to warn her about the risks of investing in start-up companies or evaluate whether Specigen would be
10 an appropriate investment for her. Certainly, there was nothing stopping Plaintiff from conducting
11 her own due diligence investigation if she was concerned about Specigen’s management, cash flow
12 or fundraising efforts. *See, e.g., Frati v. Saltzstein*, 2011 WL 1002417, *5 (S.D.N.Y. Mar. 14, 2011)
13 (defendants had no affirmative duty to disclose information that plaintiffs could have discovered in
14 the course of a reasonable due diligence investigation).⁵

15 3. Plaintiff Still Fails To Allege Facts Establishing That The D&O 16 Defendants Acted With Scienter

17 To adequately plead scienter under the PSLRA, the complaint must “state with particularity
18 facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15
19 U.S.C. § 78u-4(b)(2). In the Ninth Circuit, the required state of mind is “deliberate or conscious

20
21 ⁵ Furthermore, Plaintiff cannot claim to have been misinformed about Specigen when she does not
22 appear to have asked questions, requested documentation or otherwise investigated the company prior
23 to making her investments. *Frati*, 2011 WL 1002417, *5 (“Plaintiffs cannot claim that they were
24 uninformed about the inner-workings of a fund in which they planned to invest if they did not feel it
25 necessary to review the fund documents or perform any research prior to making such an
26 investment”). Nor can she plausibly contend that material information was withheld from her when
27 she expressly represented and warranted in the Note and Warrant Purchase Agreement by which she
28 acquired her interest in Specigen (the “Purchase Agreement”) that “the Company has given the
Investor access to the corporate records and accounts of the Company and to all information in its
possession relating to the Company, has made its officers and representatives available for interview
by the Investor, and has furnished such Investor with all documents and other information required for
the Investor to make an informed decision with respect to the purchase of the Note and the Warrant.”
Purchase Agreement at ¶ 3(e). A true and correct copy of the Purchase Agreement is attached to the
Declaration of William Fischer (“Fischer Declaration”) as Exhibit (“Ex.”) 1 (Herrera Decl. Ex. B).

recklessness.” *Silicon Graphics, supra*, 183 F.3d at 988. To qualify as “strong,” the Supreme Court has held, “an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2504-2505, 168 L.2d 179 (2007). The Supreme Court has further instructed that, in determining whether scienter has been sufficiently pled, a court must review plaintiff’s allegations “holistically.” *See In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 702 (9th Cir. 2012) (citing *Matrixx Initiatives, Inc. v. Siracusano*, ___ U.S. ___, ___, 131 S.Ct. 1309, 1324 (2011)). In this case, none of Plaintiff’s allegations are cogent or compelling enough to raise a strong inference of scienter, even when considered holistically.

The TAC generally alleges that all defendants, including the D&O Defendants, were “aware” that their respective companies (1) needed funding to survive (TAC at ¶¶ 131(a), (c) and (d)); and (2) faced significant product development challenges (*id.* at ¶¶ 87(b) and (d)). These generic allegations could be applied to virtually any start-up company. Indeed, the TAC purports to apply the same allegations indiscriminately to “all of the ’34 Act defendants” in this action (a group that includes five individual defendants and five separate entities). TAC at p. 33.

These boilerplate allegations, which are not even specific to the D&O Defendants, do not “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). *See, e.g., In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1085 (9th Cir. 2002) (affirming dismissal of Section 10(b) claims where “the bulk of the alleged adverse facts are generic, subjective, difficult to prove or refute, and could be alleged against almost any company that has experienced a drop in sales revenue”). At best, the TAC describes “routine corporate objectives,” such as the desire to obtain financing and develop new products.

The Ninth Circuit and Northern District of California have repeatedly rejected attempts to premise a strong inference of scienter on such allegations. *See, e.g., In re Rigel Pharmaceuticals, Inc. Sec. Litig.*, 697 F.3d 869, 884 (9th Cir. 2012) (“allegations of routine corporate objectives such as the desire to obtain good financing and expand are not, without more, sufficient to allege scienter; to hold otherwise would support a finding of scienter for any company that seeks to enhance its business prospects”); *see also Verona Partners, LLC v. Tenet Capital Partners Convertible Opportunities*

1 *Fund, L.P.*, 2006 WL 2669035, *12 (N.D. Cal., Sept. 18, 2006) (“Generalized assertions of financial
 2 motive, without more, are insufficient to meet the heightened pleading requirement of the PSLRA”).
 3 This Court should not hesitate to do the same.

4 **B. Plaintiff Still Fails To State A Section 20(a) Claim Against The D&O Defendants**

5 Under Section 20(a) of the Exchange Act, “[i]t shall be unlawful for any person, directly or
 6 indirectly, to do any act or thing which it would be unlawful for such person to do under the
 7 provisions of this chapter or any rule or regulation thereunder through or by means of any other
 8 person.” 15 U.S.C. § 78t(b). In order to state a claim under Section 20(a), a plaintiff must allege (1) a
 9 primary violation of the federal securities laws; and (2) that the defendant exercised actual power or
 10 control over the primary violator. *See generally Howard v. Everex Systems, Inc.*, 228 F.3d 1057,
 11 1065 (9th Cir. 2000). As discussed in detail below, Plaintiff still fails to allege a primary violation of
 12 Section 10(b) or the D&O Defendants’ actual power and control over any primary violator.

13 **1. Plaintiff Fails To Allege A Primary Violation of Section 10(b)**

14 The Ninth Circuit has not ruled on the standard for pleading a Section 20(a) claims. In the
 15 Order, the Court adopted the reasoning of several other district courts in the Ninth Circuit to conclude
 16 that Plaintiff’s control allegations need only comply with Rule 8(a). Order at 22 (*citing In re*
 17 *American Apparel, Inc. Shareholder Litig.*, 2013 WL 174119, *34 n. 204 (C.D. Cal. Jan. 16, 2013)
 18 *and Teamsters Local 617 Pension and Welfare Funds v. Apollo Group, Inc.*, 690 F.Supp.2d 959, 966-
 19 67 (D. Ariz. 2010)). However, Plaintiff must still allege a primary violation of Section 10(b) with the
 20 specificity required by Rule 9(b) and the PSLRA. *See, e.g., Kyung Cho v. UCBH Holdings, Inc.*, 890
 21 F.Supp.2d 1190, 1205 (N.D. Cal. 2012) (“Where a plaintiff asserts a Section 20(a) claim based on an
 22 underlying violation of Section 10(b), the pleading requirements for both violations are the same”).
 23 As the Order explains, “the viability of the § 20 claim depends on the viability of the primary claims
 24 under § 10(b) and Rule 10b-5.” Order at 9. The TAC confirms that Plaintiff cannot plead a viable
 25 primary claim under Section 10(b).

26 **a. Plaintiff Fails To Allege A Primary Violation By SpeciGen**

27 In the Order, the Court explained that Plaintiff’s ability to state a Section 20(a) claim against
 28 the D&O Defendants would depend on her ability to allege a primary violation against SpeciGen.

Order at 9 (“assuming that plaintiff can state a primary violation against SpeciGen, she may be able to state a § 20(a) claim against the D&O Defendants”). Significantly, Plaintiff does not even attempt to allege that SpeciGen made any false statement, as required for primary liability under Section 10(b). *See Janus*, 131 S.Ct. at 2302. Instead, Plaintiff focuses on Mr. Fischer’s alleged oral statements. However, Mr. Fischer’s alleged statements cannot support a Section 10(b) claim against SpeciGen.

As previously discussed, the Supreme Court has expressly limited primary liability under Section 10(b) to the “maker” of the alleged false statement. *See* Section IV.A.1, *supra*. As the Supreme Court explained, “the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.” *Janus*, 131 S.Ct. at 2303. Plaintiff does not allege that SpeciGen had “ultimate authority” over Mr. Fischer’s alleged oral statements, nor can she. *See, e.g., In re Gupta Corp. Sec. Litig.*, 900 F.Supp. 1217, 1240 (N.D. Cal. 1994) (oral statements attributable to individual defendants are actionable against only those defendants). In the absence of any allegation that SpeciGen made a misstatement, Plaintiff does not – and cannot – establish a primary violation of Section 10(b).

b. Plaintiff Fails To Establish A Primary Violation By Mr. Fischer

The TAC summarily alleges that “Fischer, acting as agent for SpeciGen, made numerous representations about SpeciGen that were false or materially misleading.” TAC at ¶ 87. Although Plaintiff’s theory of liability is far from clear, she appears to argue that SpeciGen can or should be vicariously liable for Mr. Fischer’s alleged wrongdoing. Although Plaintiff’s theory may have enjoyed some support in the past (*see, e.g., In re Cylink Sec. Litig.*, 178 F.Supp.2d 1077, 1088 (N.D. Cal. 2001) (“A corporate entity can be vicariously liable under section 10(b) for the fraud of its officers)), it does not appear to have survived the Supreme Court’s authoritative opinion in *Janus*.

In *Janus*, the Supreme Court limited primary liability to “the entity with authority over the content of the statement and whether and how to communicate it.” 131 S.Ct. at 2303. Writing for the majority, Justice Thomas explained that the “rule might best be exemplified by the relationship between a speechwriter and a speaker.” 131 S.Ct. at 2302. “Even when a speechwriter drafts a speech,” Justice Thomas continued, “the content is entirely within the control of the person who delivers it.” *Id.* Likewise, in this case, Mr. Fischer was the only one with “ultimate authority” over

1 his own oral statements. Under *Janus*, SpeciGen was not the “maker” of Mr. Fischer’s alleged oral
 2 statements and cannot be primarily liable for them under Section 10(b).

3 Plaintiff will undoubtedly argue that SpeciGen is vicariously liable for Mr. Fischer’s oral
 4 statements under common law agency principles. See TAC at ¶¶ 201-205. As discussed in detail
 5 below, Plaintiff’s agency allegations do not comply with the Order or Rule 9(b). See Section IV.I,
 6 *infra*. Moreover, they are inconsistent with *Janus*. The Supreme Court expressly considered and
 7 rejected a similar attempt to rely on common law alter ego principles to extend primary liability to
 8 non-speakers under Section 10(b). *Janus, supra*, 131 S.Ct. at 2304. Likewise, Justice Breyer, writing
 9 for the dissent, warned that the majority’s rule would insulate non-speakers who would otherwise be
 10 liable under common law agency principles. *Id.* at 2310. Thus, *Janus* effectively forecloses
 11 Plaintiff’s attempt to hold SpeciGen vicariously liable for Mr. Fischer’s alleged misstatements. But
 12 even assuming *arguendo* that Plaintiff can rely on the doctrine of respondeat superior to pursue a
 13 Section 10(b) claim against SpeciGen (and *Janus* suggests that she cannot), she still fails to allege
 14 either the existence of an agency relationship (*see* Section IV.I, *infra*) or a violation of Section 10(b).

15 **(1) Plaintiff Fails To Allege That Mr. Fischer Made Any**
 16 **Statement That Was False Or Misleading**

17 The TAC alleges that Mr. Fischer orally misrepresented SpeciGen’s product development,
 18 partnership and fundraising prospects (TAC at ¶¶ 87 and 89), but does not specify what Mr. Fischer
 19 actually said. Instead, Plaintiff “repackages defendants’ actual oral statements in vague and
 20 impressionistic terms.” *Wenger v. Lumisys, Inc.*, 2 F.Supp.2d 1231, 1246 (N.D. Cal. 1998). See, e.g.,
 21 TAC at ¶ 89(a) (alleging that “defendants” falsely represented that “the Series A offering was moving
 22 along well”).⁶ Courts throughout the Northern District of California have rejected Plaintiff’s
 23 “impressionistic approach to pleading fraud,” and this Court should do the same. *Wenger*, 2
 24 F.Supp.2d at 1247; and see *Copperstone v. TCSI Corp.*, 1999 WL 33295869, *9 (N.D. Cal. Jan. 19,

25 ⁶ Of course, reasonable investors do not rely on vague statements of corporate optimism like “the
 26 Series A offering was moving along well” (TAC at ¶ 89(a)), so Plaintiff’s paraphrased portrayal of the
 27 D&O Defendants’ alleged oral statement would not be actionable in any event. See, e.g., *In re*
 28 *VeriFone Sec. Litig.*, 784 F.Supp. 1471, 1481 (N.D. Cal. 1992) (“professional investors, and most
 amateur investors as well, know how to devalue the optimism of corporate executives”), *aff’d* 11 F.3d
 865 (9th Cir. 1993).

1 1999) (dismissing claims based on alleged oral statements where, as here, “Plaintiffs never allege who
2 made the statement [or] what was actually said”).

3 Plaintiff not only fails to specify Mr. Fischer’s alleged oral statements, she also fails to specify
4 “the reason or reasons why” any such statements were false or misleading when made. According to
5 Plaintiff, Mr. Fischer and/or “defendants” misrepresented SpeciGen’s (1) product development efforts
6 (TAC at ¶ 87(a), 87(d) and 89(b)); (2) partnership prospects (*id.* at ¶¶ 87(a), 87(c) and 89(c)); (3)
7 patent portfolio (*id.* at ¶ 87(h)); and (4) fundraising efforts (*id.* at ¶¶ 87(b), 87(e), 87(f), 87(g) and
8 87(h)). Plaintiff generally alleges that each such statement was false, but offers no facts to support her
9 characterization. Instead, Plaintiff relies on a series of generalities and *non sequiturs*. As discussed
10 in detail below, these allegations do not come close to satisfying Plaintiff’s pleading obligations under
11 Rule 9(b) and the PSLRA. *See generally Falkowski v. Imation Corp.*, 309 F.3d 1123, 1133 (9th Cir.
12 2002) (“vague claims about what statements were false or misleading [and] how they were false” are
13 subject to dismissal); *and see Metzler Investment GmbH v. Corinthian Colleges, Inc.*, 540 F.3d 1049,
14 1070 (9th Cir. 2008) (“A litany of alleged false statements, unaccompanied by the pleading of specific
15 facts indicating why those statements were false, does not meet [the PSLRA] standard”);

16 (a) Product Development Representations

17 Plaintiff alleges that Mr. Fischer and/or “defendants” falsely represented that SpeciGen’s
18 technology was a “proven concept” (TAC at ¶ 87(a)) which had been “vetted” by Genentech (*id.* at ¶
19 89(b)) and “validated” by an unidentified “commercial biotech company” (*id.* at ¶ 87(d)). However,
20 Plaintiff does not even explain what these alleged misstatements were supposed to mean, let alone
21 why they were false or misleading when made.⁷

22 The Ninth Circuit confronted an equally vague series of alleged misrepresentations in *Vantive*.
23 In *Vantive*, plaintiffs claimed that defendants overstated the growth and quality of their sales force.

24
25 ⁷ Furthermore, though Plaintiff alleges that “Genentech had been approached had been approached
26 but shown no interest in partnering with SpeciGen” (TAC at ¶ 89(b)) and SpeciGen’s “only revenues
27 had been primary research grants by government agencies” (*id.* at ¶ 87(d)), these *non sequiturs* do not
28 amount to an explanation why any statement was false or misleading. After all, Genentech could
have “vetted the company’s technology” (whatever that means) and *then* decided against partnering
with SpeciGen. Similarly, a commercial biotech company could have “validated” SpeciGen’s
technology (whatever that means) without giving SpeciGen money.

1 The trial court dismissed the complaint and the Ninth Circuit affirmed, explaining that “the complaint
 2 leaves unclear what it would mean for Vantive to ‘adequately train’ an employee, what ‘sufficient
 3 numbers’ of hires would be, or what it means for ‘a substantial percentage’ of people to quit.” 283
 4 F.3d at 1086-1087. Similarly, in this case, the TAC offers no explanation of the terms “proven
 5 concept,” “validated” or “vetted” and provides no objective criteria by which the truth or falsity of the
 6 alleged misstatements could be measured. In the absence of any such details, the TAC fails to
 7 establish that the alleged misstatements concerning SpeciGen’s product development efforts were
 8 false or misleading when made. *See Vantive*, 283 F.3d at 1086-1087 (complaint inadequate for failing
 9 to provide an objective measure against which allegedly “false” statements could be compared).

10 (b) Partnership Representations

11 Plaintiff’s claim that Mr. Fischer and/or “defendants” misrepresented SpeciGen’s partnership
 12 prospects is equally flawed. Plaintiff alleges that Mr. Fischer and/or “defendants” falsely represented
 13 that SpeciGen was “in advanced discussions with a public company and an established private biotech
 14 company about advanced research partnerships that would develop preclinical data sufficient to
 15 complete clinical trials.” TAC at ¶ 89(c). However, Plaintiff does not specify what “defendants”
 16 actually said, whether they used the terms “advanced discussions” and “advanced research
 17 partnerships” and if so, what they meant by them. Instead, Plaintiff offers a vague characterization of
 18 the alleged misstatement and summarily concludes that the statement was false “because no such
 19 discussions were underway.” TAC at ¶ 89(c). But these non-specific allegations do not explain
 20 anything. Was the alleged oral statement false because SpeciGen was not discussing research
 21 partnerships with anyone? Because SpeciGen was discussing research partnerships, but the
 22 discussions were preliminary, not advanced? Because SpeciGen was discussing research
 23 partnerships, but the research partnerships themselves were not advanced? Or were not likely to
 24 result in the development of preclinical data sufficient to complete clinical trials? Plaintiff does not
 25 say. Nor does she attempt to reconcile her allegation that “no such discussions were underway” (TAC
 26 at ¶89(c)) with her seemingly contradictory allegations that (1) some companies, including
 27 Genentech, apparently considered research partnerships with SpeciGen at some unspecified times
 28 (TAC at ¶¶ 87(b) and 89(b)); and (2) SpeciGen ultimately formed a research partnership with another

1 company (*id.* at ¶ 89(c)), although it was not as productive as Plaintiff would have liked. These
 2 inconsistent allegations do not explain why any alleged oral statement was false or misleading when
 3 made.

4 (c) Patent Portfolio Representations

5 Next, Plaintiff claims that Mr. Fischer falsely represented that “SpeciGen had all of the
 6 licenses and patents needed to commercially develop its technologies.” TAC at ¶ 87(h). As usual,
 7 Plaintiff does not specify what Mr. Fischer actually said or why the statement was false or misleading
 8 when made. Instead, Plaintiff claims that SpeciGen’s licenses “required ongoing royalty payments
 9 that it could not maintain at the company’s present burn rate.” TAC at ¶ 87(h).

10 Contrary to Plaintiff’s suggestion, the alleged representation that “SpeciGen had all of the
 11 licenses and patents needed to commercially develop its technologies” does not carry an implied
 12 representation that all such licenses and patents would be available to SpeciGen for free. Nor does the
 13 statement impliedly represent that royalty payments would not be difficult to make, given “the
 14 company’s present burn rate.” In the absence of greater particularity, Plaintiff has again failed to
 15 establish that any alleged statement concerning SpeciGen’s patent portfolio was false or misleading
 16 when made.

17 (d) Fundraising Representations

18 Finally, Plaintiff claims that Mr. Fischer falsely represented that the Series A offering “would
 19 be fully sufficient to carry the company to its ‘exit strategy’” (TAC at ¶ 87(b)), which “would come
 20 within 2-3 years” (*id.* at ¶ 87(g)). According to Plaintiff, these representations were false because (1)
 21 the Series A offering would not be enough to get SpeciGen to preliminary trials (TAC at ¶ 87(b)(a));
 22 and (2) barring an acquisition or substantial outside investment, “it would take an estimated 12-15
 23 years for a return on investment” (*id.* at ¶ 87(g)(3)). Put another way, the TAC alleges that Mr.
 24 Fischer failed to predict how much time and money would be required before Plaintiff would be in a
 25 position to recoup her investment. However, “the fact that a prediction proves to be wrong in
 26 hindsight does not render the statement untrue when made.” *In re Syntex Corp. Sec. Litig.*, 95 F.3d
 27 922, 929 (9th Cir. 1996). Furthermore, to the extent that the TAC specifies the challenged statements
 28 at all, they are forward-looking. *See generally No. 84 Employer-Teamster Joint Council Pension*

1 *Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (A forward-looking includes
 2 any statement regarding “plans and objectives of management for future operations” and “the
 3 assumptions ‘underlying or related to’ any of these issues”). As such, the alleged misstatements could
 4 not be actionable unless (1) they were not actually believed by the speaker; (2) there was no
 5 reasonable basis for the belief; or (3) the speaker was aware of undisclosed facts tending to seriously
 6 undermine the statement’s accuracy. *See, e.g., In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 388 (9th
 7 Cir. 2010). As discussed in detail below, the TAC does not support an inference that Mr. Fischer
 8 acted with deliberate recklessness, much less actual knowledge of falsity.

9 **(2) Plaintiff Fails To Raise A Strong Inference That Mr.**
 10 **Fischer Acted With Scienter**

11 The TAC does not raise a strong inference of scienter against Mr. Fischer or anyone else. As
 12 previously discussed, Plaintiff generally alleges that “defendants” were aware of material facts which,
 13 “in the absence of scienter, could and should have been made known to her.” TAC at ¶ 131(a).
 14 These fact-free allegations have never been enough to raise any inference of scienter, let alone a
 15 “strong,” “cogent” or “compelling” one. *See, e.g., In re VeriSign, Inc. Deriv. Litig.*, 531 F.Supp.2d
 16 1173, 1207 (N.D. Cal. 2007) (“It is not sufficient under the PSLRA to allege scienter against
 17 defendants as a group”) (*citing* 15 U.S.C. § 78u-4(b)(2) (plaintiff must “state with particularity facts
 18 giving rise to a strong inference that the defendant acted with the required state of mind”)).

19 Remarkably, though Mr. Fischer plays a starring role in the alleged fraud, Plaintiff does not
 20 even attempt to plead facts demonstrating what Mr. Fischer knew or when he knew it. This Court and
 21 numerous others have made clear that Plaintiff must allege facts giving rise to a strong inference of
 22 scienter as to *each* defendant. *See VeriSign*, 531 F.Supp.2d at 1207. After multiple amendments and
 23 extensive discovery, Plaintiff’s inability to plead facts raising a strong inference that Mr. Fischer acted
 24 with the required state of mind can only be viewed as a concession that there are no such facts. In any
 25 event, Plaintiff fails to allege that Mr. Fischer – or anyone else – violated Section 10(b).

26 **2. Plaintiff Still Fails To Allege That The D&O Defendants Exercised Power**
 27 **And Control Over Any Primary Violator**

28 Although Rule 8(a) governs Plaintiff’s control allegations, she must still “provide some

1 factual support that defendants were in a position to control a primary violator.” *In re International*
 2 *Rectifier Corp. Sec. Litig.*, 2008 WL 4555794, *22 (C.D. Cal. May 23, 2008) (“Plaintiffs cannot
 3 simply base their claims on boilerplate allegations”); *see also In re Hansen Natural Corp. Sec. Litig.*,
 4 527 F.Supp.2d 1142, 1163 (C.D. Cal. 2007) (rejecting “boilerplate” allegations that individual
 5 defendants exercised requisite power and control “by virtue of their high level positions”).
 6 Additionally, Plaintiff’s control person allegations must be “plausible on [their] face.” *Iqbal, supra*,
 7 556 U.S. at 678. Plaintiff’s control person allegations are fundamentally implausible.

8 The TAC alleges that the D&O Defendants served as officers and directors of SpeciGen
 9 (TAC at ¶¶ 8, 9 and 10) and were “directly involved” in the company’s day-to-day operations,
 10 including “decisions about what to disclose and what to withhold from investors and shareholders.”
 11 *Id.* at ¶ 143. Although Plaintiff’s theory remains unclear, she appears to suggest that the D&O
 12 Defendants exercised actual power and control over Mr. Fischer’s communications with her.

13 The TAC does not explain how the D&O Defendants could have controlled Mr. Fischer’s oral
 14 communications with Plaintiff, which are alleged to have taken place “during multiple meetings in
 15 Jackson’s home and Mr. Fischer’s office at 100 Hamilton Street, Palo Alto” (TAC at ¶ 87), from their
 16 principal places of business in Minnesota and Pennsylvania. TAC at ¶¶ 8, 9 and 10. Nor does the
 17 TAC explain how the officers and directors of five separate companies who are not alleged to have
 18 conspired together (TAC at ¶ 3), could have independently agreed to the same fraudulent scheme. In
 19 reality, there is no factual support for Plaintiff’s far-fetched theory, and no allegations that could
 20 “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. Accordingly, Plaintiff
 21 still fails to allege that the D&O Defendants exercised actual power and control over any primary
 22 violator.

23 **C. Plaintiff Still Fails To State A Claim For Breach Of Fiduciary Duty**

24 As the Court explained in the Order, the Certificate contains an exculpatory provision which
 25 limits the D&O Defendants’ personal liability for breaches of the duty of care. Order at 11;
 26 Certificate at Art. VIII (Herrera Decl. Ex. C). Therefore, in order to state a claim for breach of
 27 fiduciary duty, “plaintiff must allege facts showing that the D&O defendants acted in bad faith or
 28 intentionally failed to act in the face of a known duty to act in order to state a claim for breach of

fiduciary duty.” *Id.* at 11. The Court carefully considered the SAC and concluded that Plaintiff failed to allege any such facts. *Id.*

Plaintiff’s latest attempt to state a claim for breach of fiduciary duty is the same as her last. Despite the Court’s guidance, Plaintiff continues to rely on “boilerplate” allegations that are “so deficient with regard to what any defendant other than Fischer is alleged to have done, that it is not clear whether plaintiff is alleging that the D&O directors breached their fiduciary duties to her, as a shareholder, or that they breached their fiduciary duties to the corporation.” Order at 11. Plaintiff’s claim for breach of fiduciary duty should be dismissed with prejudice.

D. Plaintiff Still Fails To State A Claim Under Sections 25401 and 25501

Once again, Plaintiff alleges that all defendants, including the D&O Defendants, violated Sections 25401 and 25501. Section 25401 provides that:

It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Cal. Corp. C. § 25401. Section 25501 provides, in pertinent part, that:

Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him . . . unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know . . . of the untruth or omission.

Cal. Corp. C. § 25501. The Court rejected Plaintiff’s previous attempt to state a claim for relief under Sections 25401 and 25501 for two reasons. First, Plaintiff failed to allege that any of the D&O Defendants made a material misstatement.⁸ Order at 11. Second, Plaintiff failed to allege privity with the D&O Defendants. *Id.* The TAC suffers from the same fatal defects.

As previously discussed, Plaintiff still fails to allege that any of the D&O Defendants made a misstatement in connection with the sale of securities. *See* Section IV.A-B, *supra*. Despite the Order, which expressly conditioned leave to amend “to the extent that plaintiff can allege that the D&O

⁸ “Section 25401 does not apply to simple nondisclosure.” *Bowden v. Robinson*, 67 Cal.App.3d 705, 717 (1977).

defendants sold the securities in question (to the extent there were even securities sold)” (Order at 12), Plaintiff also fails to allege privity. Thus, Plaintiff still fails to state a claim for relief under Sections 25401 and 25501.

E. Plaintiff Still Fails To State A Claim Under Section 25504

The TAC also alleges that all defendants, including the D&O Defendants, violated Section 25504. Section 25504 provides that:

Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principle executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which liability is alleged to exist.

Cal. Corp. C. § 25504. In order to state a claim for relief under Section 25504, Plaintiff must plead facts establishing a primary violation of Section 25501. Order at 13 (“in the absence of a viable claim of primary liability, plaintiff cannot state a claim against the D&O defendants for control person liability under § 25504 – particularly given that the claims against the D&O defendants are based solely on statements by Fischer, which plaintiff has not shown to have been false or misleading when made”). As previously discussed, Plaintiff fails to plead any such facts. *See* Sections IV.D, *supra*. Furthermore, Plaintiff fails to allege an agency relationship between Mr. Fischer and the D&O Defendants with the specificity required by Rule 9(b) (*see* Section IV.I, *infra*) and fails to allege that the D&O Defendants “had knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.” Cal. Corp. C. § 25504. Accordingly, Plaintiff’s Section 25504 claim should be dismissed with prejudice.

F. Plaintiff Still Fails To State A Claim Under Section 25501.5

The TAC alleges that all defendants, including the D&O Defendants “knew or should have known that Fischer was an unlicensed investment advisor.” TAC at ¶ 189. According to Plaintiff, these allegations give rise to a claim for rescission under Section 25501.5, which makes it “unlawful for a person to sell securities to or through an unlicensed broker-dealer.” *Id.* at ¶ 192. Plaintiff’s

theory fails for two fundamental reasons: (1) Section 25501.5 does not apply to the facts alleged in the TAC; and (2) Plaintiff's Section 25501.5 claim is time-barred.

1. Section 25501.5 Does Not Apply

Section 25501.5, entitled "Action for rescission or damages," provides in pertinent part:

(a)(1) A person who purchases a security from or sells a security to a broker-dealer that is required to be licensed and has not, at the time of the sale or purchase, applied for and secured from the commissioner a certificate under Part 3 (commencing with Section 25200), that is in effect at the time of the sale or purchase authorizing that broker-dealer to act in that capacity, may bring an action for rescission of the sale or purchase or, if the plaintiff or the defendant no longer owns the security, for damages.

Cal. Corp. C. § 25501.5 (a)(1). By its terms, Section 25501.5 establishes a private right of action in favor of a person who purchases a security *from* an unlicensed broker-dealer. *Id.* Plaintiff claims that Mr. Fischer was an unlicensed broker-dealer, but does not – and cannot – allege that she purchased Specigen securities from him. To the contrary, the judicially noticeable Purchase Agreement confirms that she purchased convertible promissory notes from Specigen. *See* Purchase Agreement at p. 1 (reciting that "each Investor desires to purchase, and the Company desires to sell a convertible promissory note in the principal amount set forth opposite such Investor's name"). Therefore, assuming *arguendo* that the convertible promissory notes were "securities," Plaintiff purchased them from Specigen, not Mr. Fischer.⁹ Even assuming *arguendo* that Plaintiff purchased securities "from" Mr. Fischer (which she did not), she still could not assert a Section 25501.5 claim against the D&O Defendants. Plaintiff claims that the D&O Defendants are secondarily liable for Mr. Fischer's alleged misconduct. TAC at ¶ 191. Plaintiff's theory fails for several reasons.

First, Section 25501.5 does not provide for secondary liability. Section 25501.5 does not impose liability on counter-parties to transactions involving unlicensed broker-dealers. Nor does Section 25501.5 impose liability on the issuers of securities that happen to be purchased or sold by

⁹ Under California Corporations Code Section 25004, the term "broker-dealer" means "any person engaged in the business of effecting transactions in securities in this state for the account of others or for his own account." Cal. Corp. C. § 25004. Section 25004 specifically excludes "any other issuer" from the statutory definition of a "broker-dealer." Cal. Corp. C. § 25004 (a). Therefore, Specigen cannot be considered a "broker-dealer" within the meaning of Section 25004, and Section 25501.5 does not apply.

1 unlicensed broker-dealers, let alone their officers and directors. In short, there is nothing in the
 2 language of Section 25501.5 that could possibly support a claim against D&O Defendants who are
 3 not alleged to have participated in any negotiation that resulted in the transfer of stock or otherwise
 4 acted as broker-dealers.

5 Second, though resort to legislative history should not be necessary, the legislative history
 6 confirms that Section 25501.5 was “designed to address the problem of ‘bucket shops’ or ‘boiler
 7 rooms’ that engage in securities fraud.” California Bill Analysis, Assembly Committee, 2003 – 2004
 8 Regular Session, Assembly Bill 2167 (Herrera Decl. Ex. E). There is nothing in the legislative history
 9 to support Plaintiff’s theory that Section 25501.5 creates a cause of action against any person
 10 connected in any way to any transaction involving an unlicensed broker.

11 Third, the California Corporations Code does not authorize a private right of action against
 12 secondary actors who participate in a primary violation of Section 25501.5 by an unlicensed broker-
 13 dealer, and expressly provides that no such right of action may be implied. Cal. Corp. C. § 25510
 14 (“Except as explicitly provided in this chapter, no civil liability in favor of any private party shall arise
 15 against any person by implication from or as a result of the violation of any provision of this law or
 16 any rule or order hereunder”). Therefore, Plaintiff cannot assert a Section 25501.5 claim against the
 17 D&O Defendants.

18 **2. Plaintiff’s Section 25501.5 Claim Is Time-Barred**

19 Assuming *arguendo* that the statute applies, Plaintiff’s claim for relief under Section 25501.5
 20 is time-barred. The applicable statute of limitations for claims arising under Section 25501.5 is either
 21 (a) Corporations Code Section 25506, which provide for a two-year statute of limitations from the
 22 date of discovery (Cal. Corp. C. § 25506(b)); or (b) California Civil Code Section 338(a), which
 23 provides for a three-statute of limitations for claims created by statute. Order at 14. Plaintiff has
 24 previously acknowledged that the applicable statute of limitations is two years from the date of
 25 discovery. *Id.* at 15.

26 As a matter of California law, Section 25506(b)’s two year statute of limitations is triggered
 27 by inquiry notice, not actual knowledge. *Deveny v. Entropin, Inc.*, 139 Cal.App.4th 408, 423 and 428
 28 (2006) (“Inquiry notice – often called ‘storm warnings’ in the securities context – gives rise to a duty

1 of inquiry ‘when the circumstances would suggest to an investor of ordinary intelligence the
 2 probability that she has been defrauded”); *Kramas v. Security Gas & Oil, Inc.*, 672 F.2d 766, 770-771
 3 (9th Cir. 1982) (Section 25506 begins to run “when the plaintiff discovers the facts constituting the
 4 violation or in the exercise of reasonable diligence should have discovered them”).

5 Plaintiff alleges that she “became concerned” about a \$1 million “trading account” with Mr.
 6 Fischer “[i]n or about summer 2008.” TAC at ¶ 63. Thus, Plaintiff’s own allegations confirm that
 7 there were “storm warnings” giving rise to a duty to inquire as early as “summer 2008,” three years
 8 before Plaintiff filed her initial complaint. Accordingly, Plaintiff’s Section 25501.5 claim is time-
 9 barred unless the statute of limitations is tolled for some reason.

10 Under California law, the statute of limitations can be tolled by the discovery rule, which
 11 delays the accrual of the date of a cause of action until plaintiff is aware of the injury. *Hopkins v.*
 12 *Dow Corning Corp.*, 33 F.3d 1116, 1120 (9th Cir. 1994). “Where a plaintiff relies on the discovery
 13 rule, the plaintiff “must *specifically* plead facts to show (1) the time and manner of discovery and (2)
 14 the inability to have made earlier discovery despite reasonable diligence.” *Micrel, Inc. v. Monolithic*
 15 *Power Systems, Inc.*, 2005 WL 6426678, *3 (N.D. Cal. Dec. 9, 2005) (emphasis added).

16 In the Order, the Court noted that “it is not entirely clear from the SAC exactly when
 17 [Plaintiff] does claim to have discovered the alleged violations.” Order at 15. Accordingly, the Court
 18 instructed that any amended claim “must allege facts . . . sufficient to show when plaintiff discovered
 19 the alleged violation.” Order at 15. Ignoring the Order, Plaintiff now claims that:

20 The sale of securities by the defendants in violation of the statute
 21 caused Jackson, by the end of 2010, to lose the entirety of her
 22 investments. Prior to that time she had no knowledge that her
 investments were lost

23 TAC at ¶ 194. These conclusory allegations still do not show when Plaintiff discovered any alleged
 24 violation of Section 25501.5. *Compare Salameh v. Tarsadia Hotels*, 2011 WL 1044129, *9 (S.D.
 25 Cal. Mar. 22, 2011) (rejecting equally vague allegations as insufficient to delay accrual under the
 26 discovery rule). Despite the Order, Plaintiff still fails to specify when and how she discovered that
 27 Mr. Fischer was unlicensed and why she could not have discovered the violation earlier. These
 28 pleading failures are hardly surprising, considering that such information is “easy to get” and can

usually be found with “one phone call or web search.” U.S. Securities & Exchange Comm’n, Protect Your Money: Check Out Brokers and Investment Advisers (Herrera Decl. Ex. E). Under the circumstances, Plaintiff’s failure to plead facts supporting the application of the discovery rule can only be viewed as a concession that there are no such facts. Accordingly, Plaintiff’s claim for violations of Section 25501.5 is barred by the statute of limitations.

G. Plaintiff Still Fails To State A Claim For Common Law Fraud

“To state a claim for fraud or intentional misrepresentation, a plaintiff must allege (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage.” Order at 16. Once again, Plaintiff “does not adequately allege who (other than Fischer) made false or misleading statements – and even those allegations do not plead facts showing why the statements were false at the time they were made.” *Id.* Furthermore, the TAC “does not allege facts showing knowledge (by the speaker) of the falsity.” *Id.* Accordingly, Plaintiff still fails to state a claim for common law fraud.

H. Plaintiff Still Fails To State A Claim For Negligent Misrepresentation

“To state a claim for negligent misrepresentation, a plaintiff must allege (1) a misrepresentation as to a material fact; (2) without reasonable grounds for believing it to be true; (3) an intent to induce reliance; (4) justifiable reliance by the plaintiff who does not know that the representation is false; and (5) damage.” Order at 16. As the Court explained in the Order, “[t]he Ninth Circuit has not yet determined whether Rule 9(b)’s heightened pleading standard applies to a claim for negligent misrepresentation, but the majority view among district courts in California appears to be that it does.” *Id.* As previously discussed, the TAC still fails to allege that “any specific D&O defendant made a false statement, or that in making such a statement, any specific defendant lacked a reasonable belief that it was true.” *Id.* Accordingly, the TAC still fails to state a claim for negligent misrepresentation.

I. The Doctrine of Respondeat Superior Cannot Save The TAC From Dismissal

Finally, the TAC purports to state a claim for “respondeat superior” [*sic*]. TAC at ¶¶ 201-205. However, “[r]espondeat superior is not an independent cause of action – rather, it is a doctrine or theory of liability, under which, for example, an employer may be held liable for the negligent acts of

its employees.” *Mason v. Ambrose Recreation and Park Dist.*, 2010 WL 3076263, *1 (N.D. Cal. Aug. 5, 2010) (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1577 n. 28 (9th Cir. 1990)). Furthermore, Plaintiff offers no facts to support her allegation that Mr. Fischer acted as an agent for the D&O Defendants (as opposed to SpeciGen).

In the Order, the Court explained that where, as here, “a plaintiff alleges that a defendant is liable for fraud under an agency theory, Rule 9(b) requires that the existence of the agency relationship be pled with particularity.” Order at 10 (citing *Swartz*, 476 F.3d at 764-65). The Court offered guidance regarding the revisions that would be required to support Plaintiff’s agency theory. *Id.* Once again, Plaintiff has ignored the Court’s guidance. The TAC not only fails to allege specific facts establishing the existence the alleged agency relationship, it does not even clearly identify Mr. Fischer’s alleged principal. Compare TAC at ¶ 87 (alleging that Mr. Fischer acted as agent for SpeciGen) and ¶ 202 (alleging that Mr. Fischer acted as agent for the D&O Defendants). These confusing and contradictory allegations do not describe any agency relationship with particularity. Nor can they cure any of Plaintiff’s other pleading failures. Accordingly, Plaintiff’s agency allegations cannot save the TAC from dismissal.

V. CONCLUSION

For all of the foregoing reasons, the D&O Defendants respectfully submit that the TAC should be dismissed without leave to amend.

Dated: June 28, 2013

STEIN & LUBIN LLP

By: /s/ Tanya Herrera

Tanya Herrera

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